SUPREME COURT, U. S.

FEB 8 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1029

DAVIS VICK and ROBERT OKEY

Petitioners

VS.

PEOPLE OF THE STATE OF COLORADO

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Colorado, entered in the above titled case on October 7, 1968.

CITATIONS TO THE OPINION BELOW

The opinion of the Colorado Supreme Court, printed in Appendix B hereto, infra, p. 1b, is reported in 445 P. 2d 220.

JURISDICTION

The judgment of the Colorado Supreme Court was announced on September 16, 1968. Petition for rehearing was timely filed and order denying Petition was entered October 7, 1968. On January 9, 1969, the time for filing a petition for Writ of Certiorari was extended to and including February 10, 1969, by the United States Supreme Court. The federal question here sought to be reviewed was raised in the Trial Court by written Motion, R.9; by Motion for New Trial, R. 15; and on Writ of Error to the Colorado Supreme Court, Brief of Plaintiffs In Error, p. 11. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

THE QUESTION PRESENTED

Whether it is violative of the Impairment of Contract clause of the U. S. Constitution for the State of Colorado to enforce a general statute against gambling where petitioners were gambling in accordance with a city ordinance passed pursuant to a corporate charter lawfully granted by the Colorado Territory before the admission of the State of Colorado to the Union.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional Provision involved is Section 10 of Article I of the Constitution of the United States. It is printed in Appendix A, infra, p. 1a.

STATEMENT

The Colorado Territory was established by the United States of February 28, 1861. 12 Stat. 172. The Organic Act provides in part:

> Section 4. *And be it further enacted,* That the legislative power and authority of said Territory shall be vested in the governor and a legislative assembly. . . .
>
> Section 6. *And be it further enacted,* That the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of the act. . . .

Under the authority granted by the Organic Act the governor and the legislative assembly on March 11, 1864, incorporated and granted a special charter to the City of Central. Colo. Terr. S.L. 1864, P.240. Section 20 of Article V of the Charter of the City of Central provides:

> "The city council shall have power . . . to license, restrain, regulate, prohibit and suppress tippling houses, gambling houses, and the selling and giving away of any intoxicating or malt liquors by any person within the city, except by persons duly licensed."

The State of Colorado was admitted to the Union on August 1, 1876, by proclamation of the President of the United States.

Petitioners, the defendants in the Trial Court, were charged with a violation of C.R.S. 63, 40-10-9 Wagering upon games. A plea of not guilty was entered. A motion to dismiss filed by petitioners was denied.

Trial was had to the Court. The testimony and evidence showed that the City of Central had enacted an ordinance regulating and licensing gambling; that a license was issued to Robert Nye by the City of Central Gaming Commission; that said license was displayed in the Big Casino; and, that petitioners were playing at a game for money and made bets and wagers for money upon the result of the game.

Petitioners herein were found guilty and fined $150.00 plus costs each.

Reversal of the judgment was sought by writ of error to the Colorado Supreme Court. That Court affirmed the Trial Court judgment.

REASONS FOR GRANTING THE WRIT

1. The enforcement of the state statute against the petitioners operates to deny them the protection afforded by the impairment of contract clause.

2. The charter to the City of Central was not granted by the State of Colorado but rather by the Congress of the United States through the powers delegated to the Territory of Colorado. The charter is a contract and remains in full force and effect by reason of the specific terms of Sections 1 and 2 of the Schedule to the Constitution of the State of Colorado. Those sections provide:

> "Section 1. All laws remain till repealed.—That all laws in force at the adoption of this constitution, shall, so far as not inconsistent therewith, remain of the same force as if this constitution had not been adopted, until they expire by their own limitation or are altered or repealed by the general assembly; and all rights, actions, prosecutions, claims and contracts of the territory of Colorado, counties, individuals or bodies corporate (not inconsistent therewith) shall continue as if the form of government had not been changed and this constitution adopted."
>
> "Section 2. Contracts—recognizances—indictments.—That all recognizances, obligations and all other instruments entered into or executed before the admission of the state, to the territory of Colorado, or to any county, school district or other municipality therein, or any officer thereof, . . . shall continue and remain unaffected by the change of the form of government . . . "

The City of Central still exists and operates pursuant to the charter granted by the Territory.

3. The laws against gambling in Colorado are spotty in coverage, jurisdiction, enforcement and penalty. Horse and dog racing and bingo are specifically legal; card games are specifically illegal. Betting on grain futures or selling stock short or long is not dealt with by law. Where a local ordinance exists, it depends on whether the Sheriff or policeman arrests the offender as to which court has jurisdiction. That gambling in its many forms is widespread is denied by no one; that few are posecuted is admitted by all. The violation of a city ordinance against gambling in Denver can result in 90 days in jail plus a $300.00 fine; a similar violation of a state statute across the street can result in a maximum fine of $150.00 with no jailing.

By case, gambling is *malum prohibitum* with the gravity of offense largely determined by the situs of the offense, *Woolverton vs. Denver*, 146 Colo. 247, 361 P.2d 982. By one case, gambling permitted by territorial charter is sacrosanct, *Everhart vs. People*, 54 Colo. 272, 130 Pac. 1076.

It is clear that the State of Colorado has no consistent public policy concerning gambling in its many and varied forms.

4. Although not specifically raised before the Colorado Supreme Court, there are by implications serious questions of equal protection of the laws as a result of the present situation.

Against this background, it is vital to the protection of the rights of petitioners that the contract between the Territory of Colorado and the City of Central be upheld.

5. The State of Colorado is not a party to the charter contract but it recognized that contract in the very document which gives the state its legal existence.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRED M. WINNER
Counsel for Petitioner

MARSHALL QUIAT
Counsel for Petitioner

APPENDIX A

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 10. Powers denied individual states.—(1) No state shall enter into any treaty, alliance or confederation; grant letters or marque or reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

APPENDIX B

OPINION BELOW

NO. 22088

DAVIS VICK and ROBERT OKEY,
Plaintiffs in Error,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Defendant in Error.

Error to the District Court of Gilpin County

Honorable Ronald J. Hardesty, Judge

EN BANC JUDGMENT AFFIRMED

Marshall Quiat,
Attorney for Plaintiffs in Error.

Duke W. Dunbar, Attorney General,
Frank E. Hickey, Deputy Attorney General,
John P. Moore, Assistant Attorney General,
Attorneys for Defendant in Error.

MR. JUSTICE KELLEY delivered the opinion of the Court.

Davis Vick and Robert Okey, plaintiffs in error (defendants), were charged and convicted in the district court of "wagering upon games," in the City of Central (Central City), Gilpin County, in violation of C.R.S. 1963, 40-10-9. The defendants admit gambling, but claim their acts were lawful, because the gambling activity occurred in a casino licensed by the city pursuant to a valid city ordinance.

The defendants concede that there is a conflict between the ordinance and C.R.S. 1963, 40-10-9, but claim that the ordinance supersedes the statute. The defendants rely upon *Canon City v. Merris*, 137 Colo. 169, 323 P.2d 614, and *Woolverton v. Denver*, 146 Colo. 247, 361 P.2d 982, in support of their argument.

The *Merris* decision involved a conflict between a state statute and an ordinance of Canon City relating to driving a motor vehicle while under the influence of intoxicating liquor. The court was concerned with the question of whether such an offense should be prosecuted under the ordinance or under state law. We held that it was a matter of state-wide concern; consequently, the statute controlled.

Woolverton involved the validity of an ordinance of the City and County of Denver which declared gambling to be a crime. The issue was whether the city ordinance and C.R.S. 1963, 40-10-9, could coexist in view of the *Merris* decision. This court held that the statute and the ordinance were not mutually exclusive and permitted them to coexist.

Canon City and Denver are both home rule cities. Central City is not. Ordinances of home rule cities, created under Article XX of the Colorado Constitution, in matters of strictly local concern supersede state statutes relating to those matters, but, in matters of both local and state interest, the municipality does not have a superseding authority. In the latter situation, *Woolverton* holds that a home rule ciy had a supplemental authority which per-

mitted its ordinance to coexist with the state statute, *so long as they are not in conflict.*

In *Ray v. Denver*, 109 Colo. 74, 121 P.2d 886, this court observed that it "is a fundamental principle that an ordinance which is in conflict with a state law of general character and state-wide application is invalid." Also, see *Glendinning v. Denver*, 50 Colo. 240, 114 P.652. So, where the ordinance authorizes the doing of acts which the statute prohibits, the ordinance is invalid.

It is most difficult to understand the aid and comfort which the defendants derive from *Merris* and *Woolverton*. The philosophy and the rules of law enunciated in *Merris* and *Woolverton* would even invalidate an ordinance of a home rule city licensing gambling establishments if, as here, the ordinance conflicted with a state statute on the same subject. Central City, as a non-home rule city, has less legislative power and authority than a home rule city.

The status of Central City, by virtue of its Territorial Charter, was litigated in *City of Central v. Axton*, 159 Colo. 69, 410 P.2d 173. The opinion in *Axton* reviews in depth the legislative and judicial history relating to Central City's charter; it will not be repeated here. Suffice it to say that Central City, by virtue of its ancient charter, has retained no authority which overrides or supersedes the state statutes on gambling.

The other arguments advanced by defendants do not have sufficient merit to warrant extending this opinion.

The judgment is affirmed.